Pengurusan Danaharta Nasional Bhd v Ufuk Bestari Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–860 OF 2004
ABDUL WAHAB SAID AHMAD J
20 JULY 2005

Civil Procedure — Judgment and orders — Setting aside, application for — Setting aside judgment in default — Order for payment of debt — Whether writ and statement of claim properly served — Whether there was a defence on merits

The plaintiff claimed RM29,680,248.10 as at 30 April 2004, interest of 2% above BLR on RM25,520,998.68 and penalty interest of 1% ps on the said amount from 1 May 2004 until full settlement. The claim arose out of a term loan of RM40 million granted by Perwira Affin Merchant Bank ('the Bank') to subscribe Lankhorst Bhd shares. The defendants also entered into a first party memorandum of deposit of shares agreement for the same amount. The 18,000,000 Lankhorst Bhd shares of the first defendant were deposited with the bank as security for the loan. The plaintiff acquired all the rights, ownership and interests in the Bank. The first defendant then negotiated with the plaintiff to settle the debt. It was not in dispute that the plaintiff had agreed to accept a lesser payment of RM17,910,000 as full and final settlement of the indebtedness on terms and conditions of the offer. The first defendant paid the plaintiff the first payment of RM2,220,000 through the sale of 2,000,000 Lankhorst Bhd shares. This was the first defendant's appeal against the decision of the senior assistant registrar in dismissing the first defendant's application to set aside the judgment in default entered against it and that the memorandum of appearance filed by the first defendant was regular and valid. The first defendant also contended that the plaintiff, who was in possession or control of the security for the loan, had failed, neglected and or refused to dispose of the same and/or afford the first defendant the opportunity to do so.

Held, dismissing the appeal:

(1) The service of the writ was regular as it was sent to the first defendant's registered address. The first defendant's alleged reasons in its affidavit-in-support of this application were an admission that the writ was served. There was proper service of the writ at the registered address. It followed that the judgment obtained was regular (see para 5).

(2) The settlement agreement clearly provided that upon default, the total outstanding amount would become payable. The amount entered in the judgment for RM29,680,248.10 was correct. As the first defendant had failed to comply with the terms of the settlement agreement, the plaintiff was entitled to go for the entire outstanding sum (see para 9).

(3) It was within the discretion of the plaintiff when the Lankhorst Bhd shares should be disposed off. The plaintiff had the power to sell but was under no duty to sell it if it chose not to do so. However, if it was requested by the first defendant to reduce its indebtedness, the plaintiff would be liable to any losses if it failed to do so. In this case, the first defendant had never requested the plaintiff at anytime to sell those Lankhorst Bhd shares to reduce the indebtedness except the 2 million shares under the settlement agreement. The entire outstanding account due was correct (see para 12).

[**Bahasa Malaysia summary**

Plaintif menuntut RM29,680,248.10 pada 30 April 2004, faedah 2% atas BLR ke atas RM25,520,998.68 dan faedah penalti sebanyak 1% ps ke atas jumlah itu dari 1 Mei 2004 sehingga penyelesaian penuh. Tuntutan timbul daripada satu pinjaman berterma RM40 juta yang diberi oleh Perwira Affin Merchant Bank ('Bank itu') untuk subskripsi saham Lankhorst Bhd. Defendan-defendan juga telah memasuki satu memorandum deposit perjanjian saham itu untuk jumlah yang sama. 18,000,000 saham Lankhorst Bhd defendan pertama telah didepositkan dengan bank itu sebagai sekuriti untuk pinjaman itu. Plaintif telah kemudiannya memperolehi semua hak, milikan dan faedah dalam bank itu. Defendan pertama berunding dengan plaintif untuk menyelesaikan hutang itu. Adalah tidak dicanggah bahawa plaintif telah bersetuju untuk menerima bayaran yang kurang iaitu RM17,910,000 sebagai penyelesaian penuh dan terakhir hutang itu atas terma-terma dan syarat-syarat tawaran itu. Defendan pertama telah membayar kepada plaintif bayaran pertama sebanyak RM2,220,000 melalui penjualan 2,000,000 saham Lankhorst Bhd. Ini adalah rayuan defendan pertama terhadap keputusan penolong kanan pendaftar menolak permohonan defendan pertama untuk mengetepikan penghakiman ingkar yang dimasukkan terhadapnya dan bahawa memorandum kehadiran yang difailkan oleh defendan pertama adalah betul dan sah. Defendan pertama juga menuntut bahawa plaintif, yang mempunyai milikan dan penguasaan sekuriti pinjaman itu telah gagal, membiarkan atau enggan mengetepikan atau memberi peluang kepada defendan pertama untuk menjual saham-saham tersebut.

Diputuskan, menolak rayuan itu:

(1) Penyerahan writ telah mengikut aturan kerana ia dihantar kepada alamat berdaftar defendan pertama. Sebab-sebab yang dikatakan oleh defendan pertama dalam afidavit menyokong permohonan ini adalah pengakuan penyerahan writ. Terdapat penyerahan writ yang betul kepada alamat berdaftar. Maka, penghakiman yang didapatkan adalah mengikut aturan (lihat perenggan 5).

(2) Perjanjian penyelesaian jelas memperuntukkan bahawa sekiranya ada pengingkaran, jumlah besar tunggakan harus dibayar. Jumlah yang dimasukkan dalam penghakiman untuk RM29,680,248.10 adalah betul. Oleh sebab defendan pertama gagal mengikut terma-terma perjanjian penyelesaian, plaintif berhak untuk menuntut untuk kesemua jumlah tertunggak (lihat perenggan 9).

(3) Adalah budi bicara plaintif bila saham Lankhorst Bhd patut dijual. Plaintif mempunyai kuasa untuk menjual tetapi tidak bertanggungjawab untuk menjual sekiranya beliau memilih untuk tidak menjual. Tetapi, sekiranya ia dimohon oleh defendan pertama untuk mengurangkan hutangnya, plaintif akan berliabiliti ke atas sebarang kerugian sekiranya beliau gagal membuat demikian. Dalam kes ini, defendan pertama tidak pernah memohon kepada plaintif pada sebarang masa pun untuk menjual saham Lankhorst Bhd itu untuk mengurangkan hutang kecuali 2 juta saham di bawah perjanjian penyelesaian itu. Keseluruhan jumlah tertunggak adalah betul (lihat perenggan 12).]

Notes

For cases on application to set aside a judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2729, 2790–2800.

Mohamed Zaini Haji Mazlan (Mohd Iskandar Ismail with him) (Gideon Tan Razali Zaini) for the plaintiff.
Rajinder Singh (Sri Ram & Co) for the defendant.

Abdul Wahab Said Ahmad J:

[1] This is the first defendant's appeal against the decision of the SAR on 13 December 2004 dismissing the first defendant's application to set aside the judgment in default entered against it on 20 July 2004 and that the memorandum of appearance filed by the first defendant on 26 July 2002 is regular and valid.

[2] The first defendant's grounds of application are:

(a) The writ and statement of claim were sent to the first defendant's registered address. It was not sent to the first defendant's business address. If it were sent to the first defendant's business address, the first defendant would have received it. As a result of it, there was miscommunication amongst the first defendant's offices and the first defendant could not enter appearance on time.

(b) The first defendant has a defence on the merits.

[3] The plaintiff claimed RM29,680,248.10 as at 30 April 2004, interest of 2% above BLR (6% at the time) on RM25,520,998.68 and penalty interest of

1% ps on the said amount from 1 May 2004 until full settlement. The claim arose out of a Term Loan of RM40 million granted by Perwira Affin Merchant Bank on 18 June 1997 to subscribe Lankhorst shares. The defendants also entered into a first party memorandum of deposit of shares agreement for the same amount dated 18 June 1997. Here, among others 18,000,000 Lankhorst shares of the first defendant were deposited with the Bank as security for the loan.

[4] As of 29 December 1999, the plaintiff acquired all the rights, ownership and interests in the Lender Bank. The first defendant then negotiated with the plaintiff to settle the debt. It is not in dispute that the plaintiff has agreed to accept a lesser payment of RM17,910,000 as full and final settlement of the indebtedness on terms and conditions of the offer. The first defendant paid the plaintiff the first payment of RM2,220,000 through the sale of 2,000,000 Lankhorst Bhd shares.

[5] On the first issue, the plaintiff's learned counsel said that the service of the writ was regular as it was sent to the first defendant's registered address. The first defendant's alleged reasons in its affidavit-in-support of this application, is an admission that the writ was served. In para 3 of the said affidavit, the first defendant said that their failure to enter appearance within the specified time was because of mistake and miscommunication between the first defendant's offices. I am satisfied that there is proper service of the writ at the registered address. It follows that the judgment obtained was regular.

[6] On merits to set aside the default judgment the first defendant contended that the plaintiff is not entitled to the sum of RM29,680,248.10 against the first defendant. Its entitlement, if any, is limited to the reduced amount of RM15,690,000 as they had been discharged from liability to pay the full outstanding sum under the settlement agreement.

[7] The offer letter of settlement for RM17,910,000 which was duly accepted by defendants, is subject to terms and conditions therein and in particular the default clause which reads:

> If you fail to comply with the payment terms as set out above, the total outstanding amount will become immediately due from and payable by each of you jointly and severally and PDNB is entitled to recover from each of you on a joint and several basis the entire outstanding amount together with default interest.

[8] The balance settlement sum was to be paid by three tranches and the defendants had defaulted and never paid the instalments. It is also a term of the settlement that the discharge of any part of the outstanding amount is conditional upon full compliance, performance, observance to PDNB's satisfaction of all the undertakings, obligation and agreements herein.

[9] I am satisfied that the settlement agreement clearly provided that upon default, the total outstanding amount will become payable. I therefore hold

A that the amount entered in the judgment for RM29,680,248.10 is correct. As first defendant had failed to comply with the terms of the settlement agreement, the plaintiff is entitled to go for the entire outstanding sum.

[10] The first defendant also contended that the plaintiff, who is in possession or control of the security, has failed, neglected and or refused to dispose of the same and/or afford the first defendant the opportunity to do so. As at 23March 2004, one day after the first defendant's alleged default in repayment, the value of one unit of Lankhorst share was priced at RM1.28 sen. Had the plaintiff made an effort to dispose off the security at that time, the first defendant's indebtedness would have been extinguished or substantially reduced.

[11] On this issue, the plaintiff referred to the terms of memorandum of deposit of shares as exhibited in encl 16, at cl 18(i) which reads:

> Consequence of Failure to Pay and Power of Sale:
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> Failing payment by the borrower(s) on its due date or on demand as the case may be of any sum or liability mentioned therein, the bank shall be at liberty at any time thereafter without notice to us and without our consent, to sell the mortgaged securities or any of them in such manner at such price or prices and whether on tender of cash or credit and upon such terms and conditions as the bank shall think fit and to apply the net proceeds of such sale in or towards payment of any sum or liability herein without being responsible for any loss either from or through any brokers or others employed in the sale of or any loss depreciation in value of any of such mortgaged securities arising from or through any cause whatsoever.
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> Further cl 25 on Delay or Omission in Exercising Rights or Powers provides that:
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> No delay or omission on the part of the bank in exercising any rights, power, privilege or remedy in respect of this memorandum shall impair such right, power, privilege or remedy preclude any further exercise thereof or the exercise of any other rights, power, privilege or remedy. The right, privileges or remedies provided in this memorandum are cumulative and not exclusive of any rights, powers, privileges or remedies provided by law.

[12] I am of the opinion that it is within the discretion of the plaintiff when the shares should be disposed off. Plaintiff has the power to sell but is under no duty to sell it if it chooses not to do so. However, if it is requested by the first defendant to reduce its indebtedness plaintiff is liable to any losses if it failed to do so. First defendant itself had never requested plaintiff at anytime to sell those shares to reduce the indebtedness except the 2 million shares under the settlement agreement.

[13] I am also satisfied the entire outstanding account due is correct. Clause 30 of the facilities agreement provides for conclusive evidence of indebtedness. All that the first defendant did was to make bare denial of the debt without condescending to particulars of error manifest or otherwise. In absence of such particulars of error I accept the entire amount of indebtedness to be correct.

[14] I therefore dismissed the first defendant's application to set aside the judgment in default entered against it with costs as there is no merit in the issues raised.

Application dismissed with costs.

Reported by Peter Ling